

## Hertha Lund

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**Subject:** FW: hertha lund: western ag reporter

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*Editor's note: The following was written in response to the article by Catherine Vandemoer printed on the front page of the July 24 issue. LG*

### **It's what you know for sure that just ain't so...**

By Hertha L. Lund

Mark Twain once said, "It ain't what you don't know that gets you into trouble. It's what you know for sure that just ain't so."

Apparently, Dr. Catherine Vandemoer -- "Dr. Cate," who is a hydrologist, not a lawyer -- can take poetic license with the truth and state information as facts that just ain't so. In her July 24 article in the Western Ag Reporter, she conveniently stated things that were not true and/or left out other relevant information. Further, she advocated a course of action that would be detrimental to irrigators within the Flathead Irrigation Project ("Project").

Dr. Cate stated that the "proposed Compact and the recently-filed Confederated Salish Kootenai Tribes (CSKT) lawsuit challenging federal land laws have as their goal the complete takeover, ownership, and eventual decommissioning of the FIIP." There are so many misstatements in this one sentence that I have to take it part by part.

- First, the proposed Compact does not in any way challenge or have anything to do with federal land laws.
- Second, the proposed Compact in no way has the goal of the complete takeover, ownership, or decommissioning of the Project. The proposed CSKT Compact would be the 18th and final compact resolving reserved water rights in Montana. The reality is that, when the CSKT Tribes ceded their property rights to a large area of land to the United States in the 1855 Hellgate Treaty, which created the Flathead Reservation, the Tribes retained water rights sufficient to fulfill the purposes of the Reservation. The Compact does not in any way impact the ownership or decommissioning of the Project. In fact, the Compact simply would quantify existing Tribal reserved water rights, a doctrine upheld by the United States Supreme Court. The State of Montana in 1979 decided to create the Montana Reserved Water Rights Commission to negotiate compacts for reserved water rights. If these compacts were not negotiated, then the other option is litigation in front of the Water Court. In other states, the state and individual irrigators and ranchers have spent millions of dollars litigating reserved water rights with the tribes and federal government. Nothing in the proposed Compact affects the ownership of the Project. The Compact would quantify the reserved water rights that are owned by the Tribe.
- Third, by my reading of the CSKT's recent suit, it in no way deals with the Project. The Tribes are simply asking the Court to declare that, according to federal law, the reserved water rights belong to the Tribes. The lawsuit states that this action was filed in response to five or more lawsuits filed by the Flathead Joint Board of

Control ("Board") and others in which the plaintiffs requested that the State Courts of Montana rule on these federal questions.

The Board has filed more than 30 lawsuits since the 1980s in Tribal Court, state District Court, Federal Court, the United States Court of Federal Claims, and in administrative court. Some of these cases have been appealed to the Montana Supreme Court, the Ninth Circuit, the Federal Circuit Court of Appeals, and the United States Supreme Court. To date, it does not appear that the Board has prevailed even once. Yet the Board has doubled its dues for its irrigators and has filed another federal lawsuit that closely, if not exactly, resembles a case the Board already lost in the United States Court of Federal Claims.

In the Claims Court case, the Court found that "none of these contracts [irrigation contracts] established an express or implied duty to transfer management and operation of the project to the plaintiffs [Board]." As a result, the Court held that the irrigation districts did not have a compensable property interest and dismissed the Board's takings claim. In this case, the Montana District Court judge in "dicta" stated there was a takings. ["Dicta" means it was not the substantive part of the case in front of the Court and, therefore, such statements are irrelevant and have no legal precedence.]

Dr. Cate alleges that the proposed Compact is a "work around" of the "inconvenient laws" of the United States. However, again this just ain't so. The laws are very clear, and the Compact is well within those laws. In fact, if Dr. Cate were an attorney, she could not be so fast and loose with her legal advice if she wanted to keep her license.

- Lastly, Dr. Cate states that it is no wonder the Tribes and Compact Commission want the Compact so badly because, if they had to submit their claims to a court of law, they would be denied everything in the proposed Compact. Again, the Board has lost every case that has been ruled upon on these issues in the past. Yet, the Board and Dr. Cate, who has no personal interest at stake, are playing fast and loose with the State's and irrigators' purse strings while they pursue these fantastical legal theories.

The Chief Judge of the Water Court submitted a proposal asking for \$14.6 million from the Legislature to continue with the current adjudications. If the CSKT Compact is not approved by the 2015 Legislature, it is likely that the Tribes will file up to 10,000 additional claims in the Water Court because these claims will not be settled by the Compact. So far, nobody knows for sure how many millions of dollars and years that these claims will add to the adjudication process. Also, if these claims are filed, water rights holders, including irrigators, who have water rights east of the Yellowstone will likely have to hire attorneys to defend their water rights, which will result in millions of dollars of legal bills in addition to the State's costs.

Since time and space are limited and there are still misstatements and misinformation left unaddressed from Dr. Cate's article, please take time to review a Whitepaper that I prepared for my clients, irrigators, and landowners who live within the reservation and would like to see the Compact resolved and passed in this next Legislature. See the Whitepaper at [Lund-Law.com](http://Lund-Law.com), "From Lies to Truth, Why the CSKT Compact is Good for Montana."

Note: Hertha L. Lund is an attorney working with the Montana Water Stewards. Lund clerked for the Chief Judge of the United States Court of Claims and has litigated numerous property rights cases on behalf of farmers and ranchers.